Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

RONALD M. ANDERSEN,

Petitioner,

vs.

UNITED STATES OF AMERICA, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. To what extent do the equitable and inherent powers of the federal courts remain even in the context of Civil Service Reform Act employees?

2. What are the judicial, professional and public ethical issues distinguishing federal employees who are lawyers from other employees?

3. Can a government lawyer recover for loss of his job when he has left in order to comply with his ethical duties?

LIST OF PARTIES

The parties to the proceedings below were the Petitioner, Ronald M. Andersen, and the Respondents, United States of America and the Equal Employment Opportunity Commission (EEOC), as well as Justice Clarence Thomas, who was a party in the lower court in his capacity as Chairman of the EEOC (1984 through 1989) but is not named as a party herein.

The Respondents before this Court are the United States and the EEOC.

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OPINIONS BELOW

The Decision of the United States Court of Appeals for the Ninth Circuit, filed on October 5, 1993, is unpublished. It is reprinted in the Appendix hereto, page 1a, infra.

The Order of the United States District Court for the District of Arizona (Broomfield, D.J.), dated July 10, 1991, has not been reported. It is reprinted in the Appendix hereto, page 1a, infra.

JURISDICTION

Petitioner invoked Federal jurisdiction in the District Court under 28 U.S.C. §1331, 28 U.S.C. §1361, 5 U.S.C. §§701-06, 5 U.S.C. §2302, 5 U.S.C. §5596, and the First, Fourth and Fifth Amendments to the United States Constitution.

On July 10, 1991, Judge Broomfield of the United States District Court for the District of Arizona granted defendant's motion to dismiss, holding that the Civil Service Reform Act (CSRA) precluded the Court from exercising jurisdiction over Petitioner's claims under either the Administrative Procedure Act (APA) or the

United States Constitution. The Ninth Circuit affirmed the dismissal.

Jurisdiction of this Court to review the Judgment of the Ninth Circuit is invoked under 28 U.S.C. §1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitutional Provisions:

First Amendment

"Congress shall make no law...abridging the freedom of speech...or the right of the people...to petition the Government for a redress of grievances."

Fifth Amendment

"No person shall be...deprived of... property, without due process of law.

5 U.S.C. §§701-06 - Appendix

5 U.S.C. §1206 - Appendix

5 U.S.C. §§2301-02 - Appendix

5 U.S.C. §§7511-12 - Appendix

STATEMENT OF THE CASE

On January 9, 1988, tenured[1] attorney Ron Andersen, a nine-year veteran of the Equal Employment Opportunity Commission's Phoenix Regional Office, discovered that a key charging party in a multiple plaintiff sexual harassment case appeared to be involved in paying off witnesses and procuring false testimony.[2] The trial was only weeks away. Andersen sought the advice and counsel of his supervisors. He asked them to authorize him to act in conformance with the Code of Professional

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[1] The EEOC promulgated an employment tenure policy for attorneys dated August 13, 1979. C.R. 15.

[2] In this case of allegations of multiple events of sexual harassment occurring at a motel, a key government witness allegedly offered testimony "but he wanted $10,000 from each of us." (See CR 75 No. 48, copies of memoranda concerning Ronald M. Andersen, Trial Attorney, April 21, 1988.)

Conduct (Code) to investigate the potential perjured testimony and the bribes.[3]

Andersen repeatedly entreated his superiors to resolve the ethical issues presented. He sought permission to investigate, consult and/or address the court to resolve the ethical problems. However, instead of working to resolve the problem, the supervisory attorneys remained indecisive and did not permit any investigation or other resolution of the matter.[4]

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[3] Had Andersen proceeded with the case on behalf of the EEOC and called as witnesses the persons whom he reasonably believed might perjure themselves or had been subject to bribery, not only they but he could have been in violation of various Federal criminal statutes regarding these matters. 18 U.S.C. § 2, 18 U.S.C. § 201(h), 18 U.S.C. §§ 1621-22.

[4] At the time the dispute arose, Mr. Andersen was the most capable trial attorney of the eight attorneys in the Phoenix office. (Green depo., pp. 28, 57, and 74.) In all the cases, he was the lead attorney.

As a government attorney, Andersen was not free as an employee to travel or address a court where he was under express orders not to do so. Accordingly, the only avenue open to Mr. Andersen was to terminate his employment and travel as a private attorney to alert the District Court in New Mexico. On February 9, 1988, Andersen terminated his EEOC position in order to fly to Albuquerque, New Mexico, to report the unresolved ethical problems involved in the case to the United States District Court.[5]

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[5] Both this Court and the Petitioner's licensing state have held where attorneys face potential bribery and perjury of witnesses in a trial context, their "overarching" duty is to the court to prevent interference with the search for truth principle of a trial. Nix v. Whiteside, 475 U.S. 157, 166 (1986), EP 3.3 Rule 42 Arizona Supreme Court rules, Vol. 17A Arizona Revised Statutes.

Andersen filed this action on April 6, 1989, challenging his constructive discharge. Andersen alleged that he had a property right in his continued employment, as well as a liberty interest arising from his status as an officer of the court, and that the EEOC violated his right to due process by not giving him a hearing on his constructive discharge claim. Andersen also asserted a violation of his First Amendment rights as well as a deprivation of due process under the Administrative Procedure Act and a pendent state claim for wrongful termination. The United States, the EEOC and its chairman, and Green and Trujillo in their individual capacities were named as defendants.

In the District Court, Petitioner claimed that the orders of his superiors not to report the anticipated perjury, bribery and subornation of perjury to the

U.S. Attorney or the Court was a violation of his First Amendment rights and that placing him in the position of having to choose between the failure to report serious matters of potential perjury and bribery and noncompliance with his ethical obligations under the Rules of the State Bar of Arizona and the Arizona Supreme Court. He alleged that remaining in his job with the EEOC and following those orders deprived him of his property rights without due process, in violation of the Fourth and Fifth Amendments.[6] He asked the District Court to review the agency's

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[6] Andersen was denied a hearing of any kind as a matter of right in a case where the Ninth Circuit Court of Appeals recognized for the purposes of a dismissal a constitutional violation would be presumed. Memorandum Opinion p. 14 n. 16. Similarly, the Ninth Circuit held the statutory personnel scheme precludes any review for a constitutional violation. (Appendix A, pg. 1a.)

action under the Administrative Procedure Act.

The defendants filed a motion to dismiss claiming that the CSRA constituted the sole remedy. The District Court dismissed the case limiting Andersen to CSRA "protections." The District Court, in granting defendants' motion to dismiss and denying Andersen's cross-motion for summary judgment, relied on Bush v. Lucas, 462 U.S. 367 (1983); Schweiker v. Chilicky, 487 U.S. 412 (1988); Fausto v. United States, 484 U.S. 439 (1988); Saul v. United States, 928 F.2d 829 (9th Cir. 1991); and Veit v. Heckler, 746 F.2d 508 (9th Cir. 1984).

The Court of Appeals affirmed the District Court ruling holding that if Andersen's constructive discharge is a "prohibited personnel practice", any relief Andersen may have is limited to CSRA remedies.

REASONS FOR GRANTING OF WRIT

I.

LEGAL ETHICS ARE SO IMPORTANT TO THE ADMINISTRATION OF JUSTICE THAT INHERENT POWERS AND EQUITABLE REMEDIES MUST BE PRESERVED.

The Ninth Circuit decision effectively precludes government attorneys from having a legal remedy when their jobs are in jeopardy if they comply with their ethical and legal obligations to the court. In the absence of a remedy here, Andersen and those like him have no judicial review. Administrative review would be limited to a report to the Office of Special Counsel of the Merit System Protection Board (which Andersen made) with no review of that office's decision.[7] The Office of Special

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[7] At the time, the Office of Special Counsel was an adjunct of the Merit Systems Protection Board. Andersen made a complaint to the Special Counsel which refused to prosecute. There was no right to a hearing or review of this decision.

Counsel is wholly unsatisfactory in meeting Andersen's legitimate concerns. It is merely an internal prosecutorial agency that has no provision for hearings. Although its remedies can include back pay and reinstatement, its investigative resources and vulnerability to agency bias and influence does not adequately reach rights of constitutional proportion. Judicial relief is the only meaningful remedy in light of matters of professional legal ethics. The ruling itself expressly stated that its letter of non-investigation should not be "construed as an adjudication of any matter you have pending or plan to file." C.R. 15.

The Supreme Court has previously addressed attorney conduct ethical issues and advised that clear definition "would be forthcoming." In Nix v. Whiteside, 475 U.S. 157 (1986), the Court has said:

> In some future case challenging attorney conduct...we may need to define with greater precision the weight to be given to recognized canons of ethics, the standards established by the state in statutes or professional codes.... Id. at 166.

In Nix the Court held that the Sixth Amendment right to counsel was not violated by the defendant's attorney's refusal to cooperate with the defendant in presenting perjured testimony at trial. The Court stated that "...an attorney's ethical duty to advance the interests of his client is limited by an equally solemn duty to comply with the law and standards of professional conduct; it specifically ensures that the client may not use false evidence. The special duty of an attorney to prevent and disclose frauds upon the court derive from the recognition that perjury is as much a crime as tampering with witnesses or jurors by way of promises and threats and under-

mines the administration of justice." This case arises in a civil context. However, the "overarching" responsibilities of an attorney to the administration of justice that the Court found in Nix is of no less importance in the civil context. Having exercised exemplary ethical conduct, Andersen now needs this Court to revisit the issue in the civil context.[8]

The obligation of an attorney presented with potential perjury and bribery in Nix brings into play very duties the EEOC refused to allow the Petitioner to fulfill. These duties are to investigate the nature and extent (scope) of the brib-

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[8] In Nix a cornerstone constitutional right did not vitiate a professional rule designed to protect the search for truth. In this case if the decisions rendered below stand, an act of Congress sweeps state law licensing systems into a federal personnel statute, and any forum or relief was denied to the Petitioner.

ery, to identify those witnesses exposed or participating in perjury or bribery, to counsel his client in order to obtain reasonable assurance from him that perjury and bribery will not take place, and if the threat remains, to inform the court. Id. at 169-70. These are not passive mandates.[9] Id. at 171.

Courts faced with clogged dockets impose diligence and timely response by counsel so that problems revealed weeks before a trial do not remain unaddressed

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[9] The Court has not addressed the question of whether in a case involving infringement of Constitutional rights of a government employee, the employee may secure an equitable remedy, such as reinstatement. The Court noted in Bush v. Lucas, 462 U.S. 367 at 396, n. 28, that "not all personnel actions are covered by this system...certain actions by supervisors against federal employees, such as wire tapping, warrantless searches, or uncompensated takings, would not be defined as 'personnel actions' within the statutory scheme."

until the day of trial. United States v. Kamel, 965 F.2d 484, 498 (7th Cir. 1992), citing Nix. The mere fact the EEOC is a federal agency does not excuse it from complying with ethical and court-imposed responsibilities placed on counsel. United States v. Hammad, 846 F.2d 854, 858 (2nd Cir. 1988). In this case, Andersen was a seasoned trial lawyer. His supervisor had no trial experience.[10]

These orders further impinged upon Andersen's Fifth Amendment property rights to maintain his license to practice law.

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[10] Green, the supervising attorney, had never tried any cases during his tenure with the EEOC. (Green depo., pg. 57.) Green had never read the New Mexico Code of Professional Responsibility. (Green depo., pg. 46.) Green's experience in law was three years in private practice and worked with the Civil Rights Division of the United States Department of Justice. (Green depo., pp. 9-12.) He had never tried a case during his time at the Department of Justice. (Green depo., pg. 12.)

Had Andersen obeyed his supervisors and not resigned from service with the EEOC, he would have been placing his admission to the Arizona Bar in Jeopardy. Rule 42 of the Arizona Supreme Court adopted the Model Rules of Professional Conduct as governing members of the Arizona Bar. Ethics Rule (ER) 1.16(a)(1) requires that a lawyer must withdraw from representation if the representation would "result in a violation of the Rules of Professional Conduct or other law"; ER 3.3 requires that "(a) A lawyer shall not knowingly: (1) make a false statement of material fact or law to a tribunal (2) except as required by applicable law, fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client"; ER 1.2(d) states that a lawyer shall not counsel a client or assist a client in conduct "that the lawyer knows

is criminal or fraudulent..."; and ER 8.4(d) makes it "professional misconduct" for a lawyer to (d) "engage in conduct that is prejudicial to the administration of justice."

The CSRA provides very limited relief from certain "prohibited personnel practices." 5 U.S.C. §2302. The relief was inadequate because it (a) provided no right to hearing in any forum; (b) denied exposure to the process to the judiciary, the heart of and environment for meaningful application and adjudication of ethical issues; and (c) had no judicial review. "An employee may file a complaint with the Office of Special Counsel (OSC) of the Merit Systems Protection Board alleging prohibited personnel practices. The OSC investigates ...to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred,

exists or is to be taken." 5 U.S.C. §1206(a)(1).

The Court of Appeals, in affirming the District Court, held that the definition of a "prohibited personnel practice" covered Petitioner's claim. The Court concluded that the Petitioner's claim of constructive discharge was governed by the CSRA and that Petitioner was limited to its remedies.

This Court has continued to hold that the courts have inherent power to remedy constitutional violations[11] even when there is no specific federal statute making provision for review of such actions. That

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[11] Andersen was denied a hearing of any kind as a matter of right in a case where the Ninth Circuit Court of Appeals recognized for the purposes of a dismissal a constitutional violation would be presumed. Memorandum Opinion p. 14 n. 16. Similarly, the Ninth Circuit held the statutory personnel scheme precludes any review for a constitutional violation. (Appendix A, pg. 1a.)

inherent power should be exercised here. In Bell v. Hood, 327 U.S. 678, 684 (1946), this Court held that:

> "(W)here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." Id. at 684.
>
> * * *
>
> "[W]here legal rights have been invaded and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." Id. at 684.

The Court explained this longstanding rule as jurisdictional, and upheld the exercise of the federal courts' power to award appropriate relief so long as a cause of action existed under the Constitution or laws of the United States. Ibid.

In J.I. Case Co. v. Borak, 877 U.S. 426, 84 S.Ct. 1555 (1964), the Court adhered to the general rule that all appro-

priate relief is available in an action brought to vindicate a federal right when Congress has given no indication of its purpose with respect to remedies. Relying on Bell v. Hood, the Borak Court recently specifically rejected an argument that a court's remedial power to redress violations of the Securities Exchange Act of 1934 was limited to a declaratory judgment. 377 U.S. at 483-484, 84 S.Ct. at 1500. Franklin v. Gwinnett County Public Schools, ____ U.S. ____, 112 S.Ct. 1028, 1033-34, ____ L.Ed.2d ____ (1992).

Because the administration of justice in all the federal courts is a vital responsibility, the Court should find within its inherent power to fashion a remedy in a case such as this.

The issues raised by the ethical dilemma faced by Andersen did not arise out of personnel actions as contemplated by the

CSRA but, instead, relate to duties of an attorney with respect to courts. Both the Court of Appeals and the District Court treated the complaint of Petitioner as merely one of a "prohibited personnel practice" within §2301 of the Civil Service Reform Act. To accept the decision of the lower courts would be to place an important ethical dilemma solely in an administrative body not directly responsible to the courts, i.e., the Office of Special Counsel.

There is no basis for construing the CSRA to include attorneys' ethical responsibilities within the purview of 5 U.S.C. §2302 which defines prohibited personnel practices. This is the type of case that should fall within the exception indicated by the Court in Bush v. Lucas, 462 U.S. 367 at 398, n. 28, to the effect that there are and must be exceptions to the exclusivity.

Because these issues relate to the search for truth and the proper administration of justice, they are at least as important as the actions enumerated in Bush v. Lucas such as wiretapping, warrantless searches, etc. This case presents, in a civil context, the type of issues raised by the defendants' claim of incompetent or ineffective counsel in the Nix case.

The Ninth Circuit relied on U.S. v. Fausto, 484 U.S. 439 (1988), as precedent for its decision. However, that case was one in which the court was presented with a claim under the back-pay act which Fausto had brought in the claims court. The dispute was over a dismissal involving the unauthorized use of a government vehicle, not a matter of legal ethics and trial integrity as is the case here involving a witness' attempted bribery and perjury. In Fausto, the court deferred to the legisla-

tive judgment of Congress in failing to grant either administrative or judicial review of the agency's action regarding the employee.

The duties Andersen sought to uphold were the duties of any licensed lawyer. "(B)ecause of the peculiar power of the government litigator, he is subject to the ethical considerations beyond the ordinary litigator". EEOC v. Datapoint Corporation, 457 F.Supp. 62, 65 N. 10 (W.D. Tx. 1978), United States v. Baer, 575 F.2d 1295, 1300 (10th Cir. 1978).

Licensure and certification distinguish attorneys in government service from other federal employees. Professional responsibilities maintained and policed as part of the underlying state by state licensure govern behavior, conduct and the integrity of litigation systems throughout the country. This is particularly true

when the standards in question affect the very essence of a trial-search for truth. "...[T]he responsibility of an ethical lawyer, as an officer of the court and a key component of a system of justice, dedicated to a search for truth, is essentially the same whether the client announces an intention to bribe or threaten witnesses or jurors or to commit or procure perjury. *No system of justice worthy of the name can tolerate a lesser standard.*" Nix, supra, at 174.

II.

THE NINTH CIRCUIT'S DECISION IN THIS CASE CONFLICTS WITH DECISIONS OF THE DISTRICT OF COLUMBIA CIRCUIT ON A MATTER CRITICAL TO THE INTEGRITY OF LEGAL ETHICS IN FEDERAL AGENCIES.[12]

While the Ninth Circuit holds that there is no remedy of any type for one in Petitioner's position other than through the CSRA, it recognized in its decision that the Ninth Circuit position is directly contrary to that of the District of Columbia Circuit, as set forth in Spagnola v. Mathis, 859 F.2d 223 (D.C. Cir. 1988).

As the Court stated in Spagnola:

> "While we decline to extend Bivens remedies to Hubbard and

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[12] Because government attorneys cannot choose their clients or disassociate from a case and return to other clients, they are especially vulnerable to bureaucratic caprice. This requires specific sensitivity by the Court to ethical issues. Petitioner in this case had to sacrifice his job because of ethical irresponsibility of his superiors.

> Spagnola, we do not suggest that the CSRA precludes the exercise of federal jurisdiction over the constitutional claims of federal employees and job applicants altogether." Id. at 229.

The District of Columbia Circuit held that civil servants have the right to seek equitable relief against their supervisors and the agency "in vindication of their Constitutional rights." Id. at 230.[13] The type of situation in which Petitioner was placed by his supervisors' refusal to allow him to withdraw from the case where witness perjury and bribery were alleged and their direct order to him not to report the matter to the trial judge or other authorities are not the types of actions which are

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[13] Other Circuit Court decisions in agreement with the Ninth Circuit include Volk v. Hobson, 866 F.2d 1398 (5th Cir. 1989); Feit v. Ward, 886 F.2d 848 (7th Cir. 1989); McIntosh v. Turncu, 861 F.2d 524 (8th Cir. 1988); and Lombardi v. SBA, 889 F.2d 959 (10th Cir. 1989).

contemplated by the statutory definition of "personnel action." Cf. Bosco, U.S. 931 F.2d 879 (Fed. Cir. 1989). Rather, these orders by Andersen's supervisors fall within the types of excepted matters contemplated by the Court in Bush v. Lucas. These actions directly affected the Petitioner's rights as a citizen under the First Amendment to report matters of clear public concern to the appropriate authorities.

Reliance on the exclusivity of the Civil Service Act was the basis for excluding all other claims. See Statement of Case, infra.[14]

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[14] In each of the cited cases, the Court held that the presence of the statutory remedial system was a "special factor" which counsels hesitation in applying nonstatutory remedies. Bush v. Lucas, 462 U.S. at 375-76. "No Supreme Court opinion holds squarely that the CSRA always prevents federal employees from bringing Bivens actions to right job-related wrongs." Saul v. U.S., 928 F.2d 829, 837

Thus, there is a clear difference of opinion between the D.C. Circuit, on the one hand, and the Ninth Circuit, on the other hand, as to whether a Federal employee may secure equitable relief in District Court for violation of his Constitutional rights, with other Circuits either not addressing the issue or failing to distinguish between damages and equitable remedies.

III.

THE ACTIONS OF ANDERSEN'S SUPERIORS INHIBITING HIS EXERCISE OF ETHICAL CONDUCT ARE THE TYPES OF "FINAL AGENCY ACTION" FOR WHICH THE ADMINISTRATIVE PROCEDURE ACT PROVIDES A JUSTICIABLE AVENUE OF REVIEW.

Petitioner argued in District Court and before the Ninth Circuit that his constructive discharge under the facts of this case should be treated as a "final

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(9th Cir. 1991).

agency action", subject to review under the Administrative Procedure Act. Bowen v. Massachusetts, 487 U.S. 879 (1988). In Bowen, the Court held that the amendment to §702 of the APA was intended to "broaden the avenues for judicial review of agency action". The Court held that the District Court had jurisdiction to afford complete relief even though monetary relief against the United States was available in the Claims Court under the Tucker Act. The Court pointed out that the Claims Court did not have the general and equitable powers of the District Court to grant prospective relief. The Ninth Circuit's decision conflicts with this Court's decision in Bowen. Under the Ninth Circuit Decision, District Court jurisdiction would be denied even though no equitable remedy was available to Petitioner in any other forum. The Court should reverse the Ninth Circuit's

APA ruling and remand for future proceedings.

CONCLUSION

Ron Andersen is a credit to his profession. He has worked long and hard at government service only to have his career end because of his ethical advocacy. The Constitution, equitable powers of the federal court and the APA all provide justiciable claims under the circumstances here presented.

Please review this case and articulate the standards of ethical conduct enforcement and pre-eminence that will protect and support all attorneys in government service.

Respectfully submitted,

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